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No. 18,587.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1903.

THE NORFOLK AND WESTERN RAILROAD COMPANY AND MRS. O. L. SATTERFIELD, PLAINTIFFS IN ERROR,

vs.

JOHN R. SIMS, SHERIFF OF PERSON COUNTY, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

JAMES E. SHEPHERD,
ROBERT D. GILMER,
Attorney-General,
Counsel for Defendant in Error.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1903.

No. 18587.

THE NORFOLK AND WESTERN RAILROAD COMPANY AND MRS. O. L. SATTERFIELD, PLAINTIFFS IN ERROR,

vs.

JOHN R. SIMS, SHERIFF OF PERSON COUNTY, DEFENDANT IN ERROR.

BRIEF OF ARGUMENT OF DEFENDANT IN ERROR.

THE CORPORATION OF THE STATE OF ILLINOIS KNOWN AS SEARS, ROEBUCK & CO. SOLD OR OFFERED TO SELL SEWING MACHINES IN NORTH CAROLINA WITHOUT A LICENSE AS REQUIRED BY THE LAWS OF THAT STATE, AND THEREBY BECAME INDEBTED TO THE STATE IN THE SUM OF $350, IT BEING THE AMOUNT OF THE LICENSE TAX.

Section 52 of chapter 9, Acts 1901, provides that "Every manufacturer of sewing machines and every person or persons or corporation engaged in the business of selling the same in this State shall, before selling or offering for sale any such

machine, pay to the State Treasurer a tax of $350 and obtain a license." * * * "Any person required to take out license under this section who shall sell or attempt to sell any machine without having obtained license shall be deemed guilty of a misdemeanor," etc.

(a)

In section 10 of the statement of facts agreed (p. 9, Record) it will appear that Sears, Roebuck & Co. of Chicago, the manufacturers and sellers and consignors of the machines, have never paid the said tax nor obtained a license, and it further appears that, prior to the transaction with Mrs. Satterfield, it had "made several deliveries at various points in North Carolina on the lines of other interstate railroads running into North Carolina, upon the presentation of bills of lading, under the *same conditions as above described.*

(b)

If, then, these several transactions and deliveries amounted to a sale or an offer to sell or an attempt to sell in North Carolina on the part of the Chicago company, then, at the time of the levy upon the particular machine in controversy, it was indebted to the State in the sum of $350, and whatever property it had within the State was the subject of levy for said taxes, and the said company and its agents in North Carolina assisting in such violation of the revenue law were all guilty of misdemeanors and subject to the punishment and penalties prescribed.

(c)

It is contended on the part of the plaintiffs in error that the sale was made in Chicago and that the company was therefore not liable to the tax.

The defendant in error insists that the sale was not made in Chicago, but was only an executory contract which was to be completed in North Carolina, and that until the compliance

with the conditions imposed, to-wit, the payment of the purchase money evidenced by the bill of lading, the property was still in and under the control of the said company. The sale was to be completed here through the agents of the said Chicago company.

It is respectfully submitted that this is an attempt to evade the revenue law of the State, and it is too clear for argument that the railroad and express agents concerned in all of these transactions (who were one and the same person) were the agents of the Chicago company, and that it was only through them as such agents of the said Chicago company, that a complete sale of machines was effected. The authorities upon this point are abundant. The transaction is, in effect, as between these parties (the bill of lading not having been transferred to third parties), a "C. O. D." transaction. No matter what it is called, the agreement here was that the sale was not to be completed until the price was paid.

"Goods are frequently sent, especially by the express carrier, with instructions not to deliver them until they are paid for. In such cases it is understood that the payment of the price and the delivery of the goods are to be concurrent acts. The carrier who accepts the goods with such instructions undertakes that they shall not be delivered unless the condition of payment be complied with, *and becomes the agent of the shipper* of the goods to receive such payment. He therefore undertakes, in addition to his duties of carrier, to collect for the consignor the price of the goods."

Hutchins on Carriers, sec. 389.

"The obligation to require payment for the goods (or, as we say, the evidence of it), as a condition of their delivery, does not arise from the implied duty of the carrier," but is a matter of contract *whereby the agent of the carrier becomes the agent of the shipper at the point of destination.*

Ibid., sec. 391.

If the carrier should deliver without payment or the performance of other conditions imposed, the owner can recover them of the consignee, unless the consignee has sold them to a *bona fide* purchaser, as in *Barnes v. Railroad*, 104 N. C., page 25. He may also sue the railroad company.

Ibid., sec. 390.

Tiedman on Sales, sec. 85.

In Tiedman on Sales, sec. 95, it is said: "But this is not the case where the seller determines or the contract requires him to make the common carrier his own agent. In such cases there is no transfer of possession until the goods have been delivered by the carrier to the vendee or his agent. *The common method of reserving title and possession after delivery to the carrier is to have a bill of lading.*" etc.

In section 87 the same author remarks: "Where a buyer is required to do anything as a condition precedent, it follows, of course, that the title does not pass until the condition is performed. *The most common example is the prepayment of the price.* Before delivering, the title will not pass until the price is paid, wherever the contract calls for the prepayment of the price."

Apart, however, from all of these authorities, the case of *O'Neil v. Vermont*, 144 U. S., 324, is decisive of the one at bar upon this, and also upon the question of interstate commerce. This case has never, so far as we can find, been overruled or modified as to points with which we are concerned in this discussion.

The only points distinguished are in 12 Rose's Notes, page 170. By reference to that work it will appear that the decision as to the points involved in this case is untouched. The statute of Vermont provided that no one should sell intoxicating liquor within the State. O'Neil lived in New York and shipped packages of liquor from that place by express to Rutland, Vermont, to be delivered to consignee

upon payment of price. The question presented was whether the sale was made in Vermont, and the Supreme Court of that State held that it was. The Court said: "The vendors made the express company *their agent* in the matter of the delivery of the goods, with instructions not to part with the possession of them except upon prior or contemporaneous receipt of the price. The contract of sale, therefore, remained inchoate or executory while the goods were in transit or in the hands of the express company, and could only become executed and complete by their delivery to the consignee. There was a completed executory *contract* of sale in New York, but the completed *sale* was, or was to be, in this State." A reading of the opinion will, we think, show that the Supreme Court of the United States were inclined to the same opinion. Indeed, it is sustained by all of the authorities and the principle distinctly declared in *Dows v. Nat. Ex. Bank*, 91 U. S., page 631.

No cases have been cited by the plaintiffs in error in opposition to the well-settled principles declared in the opinion of the Supreme Court of Vermont and in *Dows v. Nat. Ex. Bank, supra*. In the O'Neil case this Court very clearly considered either the ruling correct or that it was bound to follow it. Can there be a question, in view of all the authorities, including the decisions of this Court, but that the sale of the machines in question was made in North Carolina by the Chicago corporation, Sears, Roebuck & Co., through its agents in that State? It would be difficult to understand how the same circumstances can constitute a sale in Vermont so as to subject the New York vendor to the penalties of the criminal laws of Vermont, and not be a sale in North Carolina so as to subject the Chicago vendors to liability for taxes under the laws of North Carolina.

The cases cited on the argument below do not, we submit, apply to our case. The point in *Crook v. Cowan*, 64 N. C.,

743, was simply whether a contract was made so that Crook could sue *in assumpsit* upon it, he having, in effect, tendered the goods through the express company to the vendee. The point as to whether the sale was complete in the view we are considering was not involved and not discussed. In *Ober v. Smith*, 78 N. C., 313, it was simply held that a delivery to the carrier upon an unconditional order was a delivery to the vendee. The same in *State v. Graves*, 121 N. C., 632. This is not in point at all here, but the following language of the opinion in Ober's case is directly in point and is altogether in line with all the authorities. The Court said: "If it appeared that * * * the vendor intended to control the goods and to retain the *jus disponendi* by sending a bill of lading to his agent or to a third person, with instructions not to deliver until the goods are paid for, then in such cases the title would not vest in the purchaser by the delivery to the carrier." On the same line is *State v. Wernwag*, 116 N. C., 1061.

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(2)

THE CHICAGO CORPORATION, SEARS, ROEBUCK & CO., HAVING INCURRED THE LIABILITY FOR TAXES, ITS PROPERTY WAS SUBJECT TO LEVY BY THE DEFENDANT IN ERROR, AND THE MACHINE IN QUESTION WAS ITS PROPERTY, THE LEVY HAVING BEEN MADE BY DEFENDANT IN ERROR BEFORE THE TERMS HAD BEEN COMPLIED WITH BY PAYMENT AND THE DELIVERY OF THE BILL OF LADING.

The machine in question was the property of the Chicago company at the time of the levy, because payment and delivery of the bill of lading had not been made. (See paragraphs 6 and 10 of "Facts Agreed," pp. 8 and 9, Record; see also "Agreement and Stipulation" as to levy, p. 16 of

Record; also paragraph 9, p. 12 of Record). This being so, it was subject to levy for the taxes due by said owner to the State for previous similar violations of the law as well as for the violation in the present transaction.

It will be noted that the defendant in error does not propose to take the machine from the warehouse of the railroad company without the payment of freight, nor does the judgment of the Court authorize this to be done. (See paragraphs 9 and 11 of the judgment, p. 12 of the Record). On the contrary, the "Agreement and Stipulation" (p. 16, Record) expressly provides for the possession of the machine until this case is finally decided. It being the property of the Chicago owners, the defendant in error insists that it can be levied upon as such property, although in the warehouse of the railroad company. As we have said, at the time of the levy Mrs. Satterfield had not complied with the terms of the contract. She had not paid to the express agent the purchase money and taken the bill of lading to the agent of the railroad company, who was also the express agent. She had done none of these things. Therefore there was either no contract at all, or it was executory. It will be seen from the authorities cited that his Honor below could well find that there were no contract rights which were to be acquired until the payment; but taking the transaction to be executory, no sale had been made, and the title still being in the Chicago company, was the subject of levy. We think all of the above authorities sustain this contention. The machine was the property of the company until the contract was complied with, and was the subject of levy. If the Chicago company was prevented from completing its unlawful sales and the further violation of the law, it was its duty to have obtained a license and shipped another machine to Mrs. Satterfield.

It is a strange doctrine that she has any right to insist upon the completion of a transaction which would be an evasion

and violation of the law. If, under these circumstances, this machine is not the subject of levy, the State will be unable to enforce all laws of this character and which yield a large income. Devices of this kind can be easily resorted to by the aid of the agents of express and railroad companies and the revenue laws defeated.

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(3)

THE LEVY IN THIS CASE IS NOT A VIOLATION OF THE LAW AS TO INTERSTATE COMMERCE.

The contention of the railroad company in this case, as we understand it, is that in some way this evasion of the laws of a State is protected by the interstate commerce clause of the Federal Constitution, and that, under its shield, a railroad, its agents, and the agents of express companies, can become the agents of foreign corporations for the purpose of making or completing sales for them in another State, and thus enable such foreign corporations to defeat the license laws of such State.

It can hardly be contended that the levy upon a debtor's property in the possession of a railroad company is inhibited. Such a levy can surely be made on goods, the goods of A in the possession of B, and we are at a loss to understand how railroad companies, after the transit is ended, can make their warehouses places of refuge against the enforcement of legal process. We are not obstructing the carrier. *The carrier's duty has been performed, and it holds the machines in its warehouse as the agent of the Chicago company, and such agency concerns alone the completion of a sale by the receipt of the purchase-money and delivery.* It has nothing what-

ever to do with the carriage of the goods, and therefore no interstate commercial element can enter into the matter.

In Shinn on Attachment, Vol. 2, sec. 578, it is said, after denying the right before the goods reach the State: "But where the property has reached its destination and the possession of the carrier is only that of a warehouseman, the carrier may be held liable as a garnishee in respect to such property." And again: "But where property is consigned to an agent of the consignor, it is subject to process of garnishment while still in the constructive possession of the consignor, and will be subject to garnishment, although stored in the United States Custom House."

In Freeman on Executions, sec. 160, it is said: "There is no reason why a common carrier should not be liable to the trustee process in the same manner as other bailees are, unless the nature of his contract is such that a judgment charging him as trustee would not protect him against a claim of the defendant, for a non-delivery of the goods at their place of destination. But we are of the opinion that such judgment would be a sufficient excuse to the trustee for the failure to deliver according to his contract." See also, Schouler on Bailments and Carriers, sec. 498.

But it is said that the levy upon the machine after the transit had ended, and while the goods were in the warehouse of the railroad company, is a violation of the law as to interstate commerce. We insist that even if such a position were tenable it cannot avail the plaintiffs in error. The point has been distinctly decided by this Court, in *O'Neil v. Vermont, supra.* This Court said:

"The Supreme Court of Vermont decided the case before us upon a ground broad enough to maintain its judgment *without considering any Federal questions.* No Federal

question was presented for its decision, as to this case, nor was the decision of a Federal question necessary to the determination of this case, nor was any actually decided, *nor does it appear that the judgment, as rendered, could not have been given without deciding one. Hale v. Akers,* 132 U. S., 554, and cases there cited. * * * It was entirely immaterial how the liquor sold by O'Neil, at Rutland, came to be there, *for sale there*—whether it was made there, or whether it was brought in some way from the State of New York. The only question was whether it was at Rutland, so as to be capable of sale there, and *whether it was sold there.*" The italics are made by the defendant in error. The O'Neil case is precisely similar to that at bar. The sale was made under the same circumstances, and it was held to be *a sale* in Vermont. Let us suppose the Vermont statute to have provided, not for total prohibition, but against a sale without license, could it possibly be argued with any show of reason that the result of the decision would have been different? Would not the Court, after holding that the sale was made in Vermont, have held that no Federal question was necessarily involved, and that the ground of the State decision was "broad enough to maintain its judgment without considering any Federal question?"

We respectfully urge that the principle applies here, and that no Federal question need be nor can be considered.

If the sale is made or completed in this State by the agents of the Chicago company, the railroad company and its agent, why are not the latter also liable under the act, as his Honor decided? The act provides that if the tax be paid by the Chicago company, no additional tax shall be required of any of its agents. Here, as we have seen, the tax was not paid, and these agents have in various parts of the State been

engaged in making or completing sales in this State for their principal, the Chicago company. We insist that they are all liable under the act.

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